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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA12-134

SARAH ANN BURNS APPELLANT V. HEATH AARON BURNS APPELLEE	**Opinion Delivered** September 26, 2012 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT, [NO. DR-2010-1474-1] HONORABLE BOBBY D. McCALLISTER, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Sarah Ann Burns appeals from a Saline County Circuit Court divorce decree awarding custody of the parties' two minor children to their father Heath Aaron Burns, refusing to grant her a portion of Heath's military retirement, and making her exclusively responsible for her student loans. On appeal, Sarah argues that these rulings were error. We affirm.

The parties were married on December 6, 2003. Two children were born of the union, G.B. on September 14, 2004, and A.B. on October 24, 2008. On December 6, 2010, Sarah petitioned for divorce on the ground of general indignities. Heath counterclaimed, asserting the same grounds. The parties resolved almost all the property issues, including Sarah's agreement to relinquish her interest in the marital home, prior to the hearing. Accordingly, in addition to deciding the custody issue, the circuit judge had only to decide the division of the vehicles that the respective parties drove, and the indebtedness thereon, apportionment of Sarah's student-loan debt, and Sarah's entitlement to a portion of Heath's military retirement.

Almost all the testimony adduced at the hearing was directed to the custody issue.

Sarah testified that she worked as a business consultant for a company called FIS. Her salary was $54,000 per year. She indicated that her marital problems began after Heath had returned from an overseas deployment in Kuwait, and she stated that she planned on filing bankruptcy after the divorce. Sarah disputed that she was having an affair with co-worker Todd Martin. She claimed she had only a "platonic" relationship with Martin, but acknowledged that Martin was a frequent visitor in her home, having spent the night there, but only when the children were not present. According to Sarah, she did not engage in any displays of affection with Martin in front of the children. Sarah asserted that Heath suspected her of having an affair with Martin because Martin was also in a failing marriage.

Sarah stated that she wanted to have primary physical custody of the children, with Heath allotted "liberal visitation." She claimed that Heath was "very short tempered," did not have "a lot of patience" with the children, used profanity in front of the children, and used illegal drugs. Sarah accused Heath of not contributing to the support of the children because he refused to buy school supplies or school clothes and that his only contribution was paying for half of the daycare expenses for their youngest child.

Todd Martin confirmed that he visited Sarah in her residence "a couple of times a week," but denied having a "physical relationship" with her. He noted that Sarah helped him get his current job at FIS. Martin acknowledged that his wife had filed for divorce, but claimed he had no idea why, because his wife refused to talk to him. He admitted that he and Sarah engaged in "a lot of texting" often late into the evening.

Heath admitted that he smoked marijuana when he was nineteen years old but denied using illegal drugs during his marriage. He asserted that Sarah was financially irresponsible, noting that despite making $55,000 per year, she claimed that she did not have enough money to buy groceries for her and the children. Heath believed that Sarah was having an affair with Martin. Heath claimed that when he returns the children from visitation, he sends a text to Sarah and does not take them to the door of Sarah's apartment because Todd Martin is present, a fact he deduces from the presence of Martin's truck at the residence. He was also aware from reviewing his phone bills that there were a lot of text messages between Sarah and Martin, at all hours of the day, including early mornings and very late at night. In addition to her relationship with Martin and her lack of financial responsibility, Heath pointed to Sarah's choice to play in a country-music band "all over the State of Arkansas in little po-dunk bars," rather than spending time with her children.

Heath stated that he was employed as a "traditional guardsman" in the Arkansas Air National Guard. According to Heath, he had been in the Air Guard for approximately four years. Prior to that, he served in the active-duty Air Force. He claimed that his work hours could be adjusted to accommodate his parenting responsibilities. Heath noted that he was not behind on any of his financial obligations. He claimed that he was the better choice as custodial parent because Sarah's life was "unstable." Heath stated that the parties had always maintained separate credit cards. He noted that while Sarah was behind on several of her bills, he was current on his financial obligations. Heath specifically mentioned Sarah was not making payments on the $29,000 balance owed for her student loans. According to Heath, Sarah had used the money not only for tuition at Charleston Southern University, but also to

pay off Sarah's personal credit cards and to pay for breast augmentation. Heath did admit that the children were clean and well dressed when he picked them up and had not had any serious medical problems.

Neighbor Missy Ziemski testified that she never observed any vehicles at Sarah's residence while Heath was deployed and that she did not know, or know of, Todd Martin. She did recall Sarah asking her for Xanax "a couple of times." She admitted giving pills to Sarah because Sarah was "very emotional, having a nervous breakdown almost."

Neighbor Starla Beall testified that she had some "pretty close conversations" with Sarah regarding Todd Martin. According to Beall, Sarah admitted that she was "intimate" with Martin and that Martin would come to Sarah's house at approximately 2:00 a.m. on occasions. Beall recalled Sarah telling her that she had the "best sex" with Martin. She confirmed that Sarah had anxiety attacks. She also noted that Heath was trying to keep the marriage together and that it "broke [her] heart to see Heath try so hard."

Heath's boss, Senior Master Sergeant Shawn Harre, testified that his organization could accommodate Heath if he needed to pick up his children or take them to appointments. He stated that work hours were flexible and that they accommodated other people who needed to take their children to school or daycare. Harre also noted that Heath was subject to random drug testing and was tested at least annually. He stated that Heath had been a "dependable employee," and although he was on active-duty orders at the present time, Heath would likely revert back to traditional guardsman status.

After taking the case under submission and holding the record open for additional evidence regarding Sarah's student loans, the trial court granted the parties a divorce and made

the above-referenced rulings that Sarah now challenges on appeal. The trial court specifically found Martin and Beall to not be credible and noted that one or both of the parties had likely been less than honest. In making his custody decision, the trial judge stated that a parent's "day-to-day conduct both with and away from your kids affects your parenting," and that "Mom at this point in her life is more interested in her life than she is in her kids, and I think her day-to-day conduct has shown that."

Sarah first argues that the trial court erred in awarding custody to Heath. She asserts that the trial court abused its discretion by not treating the best interest of the children as the primary basis for its decision. Sarah claims that the trial court instead awarded custody to Heath because it believed that she was "less than honest." She points to the fact that she was the custodial parent during the pendency of the divorce and lost custody because the decision turned on "who was the ugliest." Sarah asks that we reverse and remand this case to the trial court to render an opinion "pursuant to what is in the best interest of the child." We find no merit to this argument.

At the outset, we acknowledge that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Alphin v. Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005). On appeal, we review the evidence de novo but will not reverse unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Delgado v. Delgado*, 2012 Ark. App. 100, ___ S.W.3d ___. We give considerable deference to the superior position of the trial court to view and judge the credibility of the witnesses. *Id.*

Contrary to Sarah's assertions, we do not believe that the trial court ignored the best

interest of the children in making its custody decision. While it expressed disappointment in the lack of candor on the part of certain witnesses, its decision was based on what it perceived to be the parties' relative commitment to parenting the minor children. It found that Sarah had demonstrated a tendency to put her own desires ahead of focusing her attention on being the primary custodian of the children. Given our deference to the trial court on matters of credibility, we cannot say that this finding was clearly against the preponderance of the evidence.

Sarah next argues that the trial court erred in refusing to grant her a portion of Heath's military retirement. She asserts that the trial court's failure to make such an award amounted to an unequal distribution of marital assets. We disagree.

The supreme court has held that nonvested military retirement is not a marital asset subject to division upon divorce. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993); *Durham v. Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986). Here, there was no evidence that Heath had a vested right in a military retirement. Indeed, the only testimony concerning his tenure in the military was that he had been in the Arkansas Air National Guard for only about four years after some time in the active-duty Air Force. Accordingly, we affirm the trial court's decision on this point.

Sarah next argues that the trial court erred in requiring her to pay all of her student loans, which were incurred during the marriage. Citing *Ellis v. Ellis*, 75 Ark. App. 173, 57 S.W.3d 220 (2001), and *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998), she notes that the trial court has the authority to allocate marital debts between the parties. Further, she urges us to find dispositive the recent case of *Easley v. Easley*, 2010 Ark. App. 73,

where we affirmed an apportionment of student loans as marital debt. We find no error in the trial court's ruling.

As the *Easley* court notes, division of marital debt is not addressed in Arkansas Code Annotated section 9-12-315 (Repl. 2009), which deals with the division of marital assets. Nonetheless, it is settled law that debt must be apportioned in an equitable manner. *Boxley v. Boxley*, 77 Ark. App. 136, 73 S.W.3d 19 (2002). A trial court's findings regarding the division of marital debt will not be reversed unless they are clearly erroneous. *Id.* In our review, we will not substitute our judgment as to what exact interest each party should have; we will decide only whether the order is clearly wrong. *Id.*

We note first that Sarah's reliance on *Easley* is misplaced. There, we affirmed express, undisputed findings by the trial court that eighty-five percent of the student loans was used to pay for family expenses, which made it equally divisible marital debt. The remaining fifteen percent was apportioned exclusively to the party who received the education. In the case at bar, Sarah failed to avail herself of the opportunity presented to her by the trial judge by keeping the record open so that she could present similar proof regarding what portion of the student loans were used to support the family. Accordingly, we cannot say that the trial court clearly erred in finding that all of the student loans were used for Sarah's personal expenses. Obviously, she had retained the personal benefit of her education.

Affirmed.

WYNNE and GRUBER, JJ., agree.

Jimmy Ray Baxter, for appellant.

No response.